United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be Argued by:
Eugene M. Welch

Docket No. 74-2108

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By mail

IN THE
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

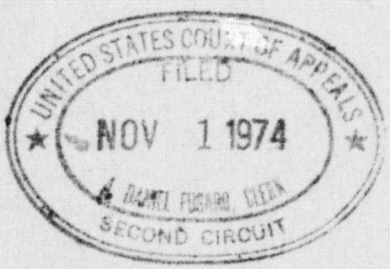
—*v.*—

THOMAS M. FAHEY,

Appellant.

On Appeal From the Judgment of the United States District Court for the Northern District of New York

BRIEF FOR APPELLEE,
United States of America



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BRIEF FOR APPELLEE, United States of America

STATEMENT OF ISSUES

I. Did the trial court err in not dismissing indictment as a matter of law on the ground that payments to partners—made pursuant to an agreement between partners that such payments are draws—are not taxable income?

II. Did the trial court err by not instructing on the law of taxable income in a partnership?

III. Was there error below concerning the alleged advice of an accountant?

IV. Was the motion for judgment of acquittal properly denied?

V. Does the alleged abuse of the grand jury constitute grounds for reversal on the facts of this case?

VI. Was there prosecutorial misconduct adversely influencing the defendant's right to a fair trial?

STATEMENT OF THE CASE

The appellee, United States of America, submits that as to the discussion of the evidence, the discussion in the arguments below should be sufficient except that it is requested that the court consider all of the evidence set forth in all of the appendices.

POINT I

TRIAL COURT DID NOT ERR IN NOT DISMISSING INDICTMENT AS A MATTER OF LAW ON THE GROUND THAT PAYMENTS TO PARTNERS—MADE PURSUANT TO AN AGREEMENT BETWEEN PARTNERS THAT SUCH PAYMENTS ARE DRAWS—ARE NOT TAXABLE INCOME.

The government submits that as to this issue and the next, concerning the Court's charge to the jury on taxable income in a partnership, Mr. Fahey and his counsel cannot now argue that this money paid to Mr. Fahey by the partnership is not taxable, because defense counsel, in his motion at the close of the evidence, specifically conceded to the trial Court that this was taxable income. (Tr. p. 197-198). To have conceded to the trial court on argument of his motion that this *was* taxable income and then appeal the trial court's ruling on the basis that it *was not* taxable income is disingenuous to say the least. It is respectfully submitted that this Court should not even consider Mr. Fahey's first two points as properly before this Court since the question of this being taxable income was conceded in the Court below.

In addition, the government submits that if counsel had properly raised this question of whether these payments to Fahey were taxable, the trial court would have been correct in ruling that they were taxable. No matter what label is attached to these payments, and the proper label was a fact question resolved by the jury, these payments are taxable. They were guaranteed payments to Fahey and are covered by 26 U.S.C. § 707(c) which

makes them taxable income. In this regard see also, *Miller* v. *Commissioner*, 52 T.C. 752, 758 (1969); *Falconer* v. *Commissioner*, 40 T.C. 1011 (1963). There is simply no basis for Fahey's contention that if the partners agree these payments are "draws" even though they are in fact salary, then they are not taxable. One cannot enter into a contractual arrangement with one's employer to call ordinary income something else so as to make it non-taxable in spite of the Internal Revenue Code.

Common sense also leads to the conclusion that this was taxable income since Fahey had no capital investment in this partnership (Tr. pp. 161-162) and therefore any money he received could not be a return of his capital. It is new income to him.

It is also clear that even if the label attached to these payments were relevant (and as argued above we contend it is not relevant), there was a fact question, resolved by the jury against Mr. Fahey, as to the existence of these oral agreements late in 1967. The evidence shows the existence of only the one written agreement in effect during the period in question and that is Exhibit 19, the November 16, 1965 Articles of Partnership signed by Fahey and his partners, which states that Fahey is to receive $20,000 a year as a salary. (Tr. pp. 55, 56, 138, 158).

It should also be noted that defense witnesses Foody (Tr. pp. 97, 104), and Gravante (Tr. pp. 174, 183, 184), both CPAs, admitted that these payments to Fahey were taxable income and were treated as such. They admitted that they were treated as a salary and the partnership received the benefit of a business expense deduction for Fahey's salary also.

Viewing the evidence in the light most favorable to the government after the jury has returned its guilty verdict it is clear that these payments were salary and as such were taxable. In addition to the above-mentioned testimony of defense witnesses Foody and Gravante, there is the November 16, 1965 Articles of Partnership which states this is a salary. There is the testimony and evidence which shows that it is the same as the salary paid to Fahey by the Culotti Construction Company that Fahey did

report as taxable income. There is Exhibit 28, the April 6, 1966 letter from Fahey to investing partner McKinney in which Fahey asks McKinney to make a further deposit in McKinney's capital account so that Fahey can draw his salary from the partnership instead of from Culotti. McKinney testified Fahey received a portion of his salary of $20,000 from the partnership and a portion from Culotti (Tr. p. 58). Fahey, himself, admitted receiving $1,666 per month gross salary from Culotti until May of 1967 and then picking up the remainder from the partnership beginning in June 1967 in identical monthly payments of $1,666 from the nursing home partnership. (Tr. p. 163. See also Ex. 17). This record clearly establishes that the money Fahey received from Culotti was identical to what he received from the partnership, a salary. He reported the Culotti salary as taxable income and it is clear he should have so reported the salary from the partnership.

In addition, Fahey knew it was a salary he was receiving from these two sources. He submitted financial statements to Marine Midland Bank listing this salary (See Ex's. 20, 21, 22, 23). In fact, Exhibit 22 is clearly a prior inconsistent statement because in that financial statement he lists his salary as $20,000 and then states in addition, he was to receive a percentage of the profits. Yet he attempted to lead the trial court and jury to believe that the $20,000 salary he received (at least so much of it as he was receiving from the partnership) was a draw against future profits. Yet he told the bank in Exhibit 22 that he was getting this $20,000 as a salary period, and then was getting a percentage of the profits, in addition to this salary.

An examination of Exhibits 26 and 27, which contain the Form 843 which Fahey signed demonstrates that Fahey knew this was a salary and that it was taxable since the statement he made in that Form 843 is that he is required to and will pay self-employment taxes on this salary.

The evidence is clear, we submit, that these payments to Fahey in 1966 and 1967 from the partnership were in fact a salary and as such were taxable income. Any attempt to label

them as "draws" can only be an attempt at obfuscation. It is clear they were salary. It is clear that even if labeled "draws" they were still taxable. The contention here, that the indictment should have been dismissed by the trial court is without merit and there was no error below.

POINT II

THE TRIAL COURT DID NOT ERR BY NOT INSTRUCTING ON THE LAW OF TAXABLE INCOME IN A PARTNERSHIP.

As mentioned in Point I above, the defense conceded to the Court below, in almost the same breath as when counsel said he had no requests to charge, that there was no issue on taxable income. It was clear that this was taxable income. In view of that fact, an instruction on taxable income from a partnership would only have confused the jury.

The defense not only conceded this was not an issue but also did not request the charge which it is alleged here, for the first time, was necessary. After the Court's instruction defense counsel noted he had no exceptions to the charge as given (Tr. p. 255). Therefore, pursuant to Rules 30 and 52, Federal Rules of Criminal Procedure, Fahey cannot claim the charge was in error unless it rises to the level of plain error. The government submits that on this record it was not error, much less plain error.

The only real issues were whether the jury believed Fahey's contention that he did not report this salary on the advice of the accountant and whether, if he knew it was taxable income that should have been reported, did he fail to report it with the intent to defeat the additional tax due and owing on that income. They were simple issues and on these issues the Court's charge was adequate. (Tr. pp. 251, 252). The Court's charge accurately instructed the jury on all the elements of this offense. (Tr. p. 248).

The government submits that Fahey's reliance on the footnote in *United States* v. *O'Connor*, 237 F.2d 466, 474, n.8 (2d Cir.

1956) is incorrect. In the first place the alleged non-taxability of this partnership salary was not a theory of the defense in the Court below. In the second place, O'Connor was a complicated net worth case requiring a detailed instruction on the net worth theory as well as the complicated defense of the inaccuracy of the government's proof of the defendant's opening net worth. In this case the proof dealt with one specific item for two years and the attempted defense was equally uncomplicated.

In the third place, it should be noted that this cited footnote was based upon two earlier appellate decisions involving complicated issues and complicated theories of defense *Tatum* v. *United States*, 190 F.2d 612 (D.C. Cir. 1951) (Insanity) and a refusal by a trial court of a *requested instruction* on the theory of the defense *United States* v. *Indian Trailer Corp.*, 226 F.2d 595 (7th Cir. 1955). This trial and appeal involved neither of these factors. The trial was not complex nor was there any request for an instruction on the theory of the defense.

The trial below was not so complex as to require the Court, in the interest of justice, without any tendered instructions, to give instructions regarding the defense theory in order to insure the jury's understanding. The jury clearly understood the defense theory of reliance on advice of counsel from the evidence offered by both the defense and prosecution, and the summations of both counsel.

Furthermore, a reviewing Court is required to determine whether the instructions as a whole properly submitted the cause to the jury. *Kowalchuk* v. *United States*, 176 F.2d 873 (6th Cir. 1949); *Taylor* v. *United States*, 142 F.2d 808 (9th Cir. 1944); *cert. den.* 323 U.S. 723, *rehearing den.*, 323 U.S. 813. The charge given by Judge MacMahon did not leave Fahey's theories raised at trial "impliedly deprecated or disparaged by failure to mention them." *Apel* v. *United States*, 247 F.2d 277-283 (8th Cir. 1957). In fact, the Court gave instructions which clearly imported to the jury that the appellant must be found not guilty if the jury found him acting in good faith. (Tr. p. 251). Thus, the jury was instructed that if they found the appellant to have been

acting in good faith and in reliance on counsel in not declaring the partnership salary as income, appellant was to be acquitted. The jury, after receiving such instructions, returned a verdict of guilty.

POINT III

THERE WAS NO ERROR BELOW CONCERNING THE ALLEGED ADVICE OF AN ACCOUNTANT.

Fahey's brief contends that there was error in the Court's failure to give a detailed instruction on the defense theory of reliance on the advice of expert counsel, the accountant from Ernst & Ernst. The government submits that the arguments in Point II of this brief apply with equal force on this point also. This allegation of error was not properly preserved as an appeal issue because the defense made no specific request to charge and took no exception to the charge as given. If the defense sincerely believed a more detailed charge should have been given, that should have been called to the trial court's attention in time for it to have made an additional charge satisfactory to the defense. But nothing was said until the matter reached this Court.

In addition, a review of the record demonstrates that this defense theory (assuming such a defense was actually established, see below) was not so complicated as to be beyond the grasp of this jury in the absence of a specific instruction and, therefore, the lack of a specific instruction on this point cannot be argued as plain error.

The Court's charge as a whole was fair, adequate and as detailed as was necessary. The Court stressed that the jury could not find Fahey guilty if they found he acted in good faith. (Tr. p. 251).

In addition, the government submits Fahey was not entitled to a specific instruction on the defense of reliance on the advice of counsel because as can be seen by a review of the testimony and exhibits aided by the further discussion herein, such a defense was never established. The actual transmittal letters alleged to

have constituted this advice (Defendant's Exhibits B, C, and D) are silent as to the item of income in question, Fahey's salary. The alleged advisors, accountants at Ernst & Ernst, were clearly not Fahey's advisors for his individual income tax returns. Fahey did not make full disclosure to Ernst & Ernst of all the facts an advisor would need. Fahey did not follow what he contended was the advice of the accountants in that on his individual tax return for 1968, after receiving the exact same "advice" in a transmittal letter for the partnership return for 1968 (Government's Exhibit 25), he reported his salary from the partnership, contrary to his omission of this salary from his 1966 and 1967 returns.

At trial, appellant offered evidence in an attempt to show that he had relied on an accountant from the firm of Ernst & Ernst in not declaring salaries received from his partnership on his personal income tax returns for 1966 and 1967. That evidence consisted of transmittal letters from accountant Alan Boers of Ernst & Ernst (Defendant's Exhibits B, C, and D). With those letters Boers transmitted to Fahey, as administrator of the nursing home partnership, the partnership's information returns which Fahey was to sign and file for 1965, 1966 and 1967. In the letters there was a specific reference to Schedule K, column 4 of the Partnership Return and a direction that each partner should include on his individual return the amount shown after his name in that column. That column reflected the losses that two of the partners could take the benefit of, but as to Fahey, that column showed "none". Those transmittal letters were silent concerning Schedule K, column 6, which showed Fahey's salary. Fahey testified that these letters were advice of counsel which was the reason for his not reporting his salary on his individual return.

There are, however, some very important limitations to t advice of counsel defense. One such limitation is requirement of total disclosure to the counsel or accoun relied upon. It is an essential element of the defense that a facts concerning the taxpayer's income are disclose advisor. *United States* v. *Cox*, 348 F.2d 294 (6th Cir. 1 *United States* v. *Baldwin*, 307 F.2d 577 (7th Cir. 1962), *cert. de*

371 U.S. 947) *Bisno* v. *United States*, 299 F.2d 711 (9th Cir. 1961), *cert. den.*, 370 U.S. 952, *reh. den.*, 371 U.S. 855.

Fahey definitely did not make full disclosure to the accountants from Ernst & Ernst. He could not have, due to the fact that the accounting firm was not handling Fahey's personal return, but that of the partnership. (Tr. p. 83). Boers, a defense witness and accountant from Ernst & Ernst, testified that he had no idea whether Fahey had any tax liabilities. (Tr. p. 91). Further, Fahey testified that he had never asked either Boers or Foody (another Ernst & Ernst accountant) about the treatment to be given Schedule K, column 6, of the Partnership returns, labelled, "Payment to Partners, salaries, and interest." Obviously, full disclosure was not made to the two involved CPAs and Fahey cannot successfully raise the defense of advice of counsel.

Furthermore, there was evidence introduced at trial which rebuts the assertion that Fahey relied on the accountants' instructions in the transmittal letters or, in the alternative, did not always follow their instructions. Defense Exhibits B, C, and D have no reference as to the treatment to be given Schedule K, column 6 of the Partnership return in Fahey's personal return. (Tr. p. 134). Fahey testified that he relied on these instructions when completing his personal returns for 1965 (Tr. p. 129), 1966, and 1967 (Tr. p. 130). However, Fahey testified that he again had the transmittal letter and the Partnership return with him when he filed his 1968 return (Tr. p. 139), but that he declared the amount in Schedule K, column 6, of the Partnership return for 1968, $21,000 in his Individual Return for 1968, Government's Exhibit 8 (Tr. p. 142). It is not credible that Fahey allegedly relied on these transmittal letters for three years and did not declare the amounts from unmentioned columns in his own return, only to declare $21,000 in 1968 when the transmittal instructions were no different.

Further, Foody testified that Fahey did not always follow the advice that Ernst & Ernst gave him in the area for which they were hired to advise, the partnership's operation. (Tr. p. 100-101).

It is therefore submittted that a proper "advice of counsel" defense was not established and there was no error on this record, in any event, as to the lack of any specific instruction on this, especially in view of the defendant's failure to request such a charge or object to the charge as given.

POINT IV

THE MOTION FOR JUDGMENT OF ACQUITTAL WAS PROPERLY DENIED.

Fahey's brief contends that the trial court erred in not granting a judgment of acquittal on the grounds that the government's proof failed on taxability and willful intent to evade or defeat the tax. On the question of taxability the government submits that on his motion for a judgment of acquittal the defense counsel conceded to the Court that there was no question about it; this was taxable income (Tr. p. 197). Therefore, it seems inappropriate to be appealing a ruling in a lower court that counsel agreed to. In addition, in Point I above, the government demonstrated the proof that this guaranteed payment to Fahey, this salary, was taxable.

On the question of willful intent to evade the taxes, the trial court felt there was sufficient evidence for the jury to find Fahey guilty and submitted the case to the jury. Since the jury has considered the evidence submitted by the government and defense, and has returned a guilty verdict, this Court must consider the evidence in the light most favorable to the government.

The most compelling evidence of Fahey's willfulness is his pattern of concealment. *Spies* v. *United States*, 317 U.S. 492 (1943). Fahey had FICA and income tax withheld from some of his salary checks from the nursing home partnership in 1966. When the new accountants for the partnership saw this they instructed Fahey to file for a return of the FICA contribution, half of which belonged to the partnership and half to Fahey. Fahey filed Form 843 (Government's Exhibits 26 and 27) in which he admitted his salary was subject to self-employment

taxes and that he would pay those taxes. However, to conceal this unreported income he never paid self-employment taxes for 1966 or 1967 (Government's Exhibits 3 and 4). To conceal this unreported income, he did not claim as a credit on his 1966 return (Government's Exhibit 1) the $1,595 that had been initially withheld from his partnership salary (this figure is established on Government's Exhibit #7) and which he knew about in approximate figures (Tr. pp. 150-152). Mr. Boers testified he had prepared forms for Fahey to use to claim this amount on his individual tax return (Tr. p. 87). To claim a credit for that $1,595 already withheld, Fahey would have been required to disclose on his 1966 return that he was getting this salary from the nursing home partnership.

As part of this pattern of concealment Fahey filed his 1966 return a year late. On that return he claimed a refund. Yet, in 1966 in a letter to the investing partner, McKinney (Government's Exhibit 28) Fahey claimed he needed his salary because he needed money for his personal obligations. Given this set of circumstances the jury inferred that it was concealment by Fahey that caused him to file a return claiming a refund a whole year late when he needed money.

As further evidence of this pattern of concealment, when Fahey was asked by IRS Auditor Laura Post in June of 1969, two months after he filed his 1968 return reporting as income the partnership salary for 1968, whether he had any other income in 1967, the year she was auditing, he said no. At that point he knew his salary was taxable income, even under his version of the facts, yet he concealed this from the auditor. (Tr. p. 21 Mrs. Post; p. 143 Fahey).

His willful intent to evade the tax is demonstrated by his reporting the Culotti salary for which he got a W-2 form but not the partnership salary, for which there was no W-2. *Black* v. *United States*, 353 F.2d 885 (D.C. Cir. 1965). As discussed in Point I above, Fahey knew that the payments from Culotti were in the same category as the payments from the partnership, taxable income as a salary, yet he did not report the partnership payments as he did the Culotti payments.

As further evidence on this question of willfulness the jury could consider the evidence of the pattern of his substantially understating his income for successive years. *Holland* v. *United States*, 348 U.S. 121, 139 (1954); *United States* v. *Coblentz*, 453 F.2d 503 (2nd Cir. 1972); *United States* v. *Siragusa*, 450 F.2d 592 (2d Cir. 1971); *United States* v. *Moran*, 236 F.2d 361 (2d Cir. 1956). Fahey's educational and extensive business experience background is an element for the jury to have considered on this question as well, *United States* v. *Rischard*, 471 F.2d 105 (8th Cir. 1973); *United States* v. *Ostendorff*, 371 F.2d 729 (4th Cir. 1967).

With all of the above evidence it is clear that the Court below did not err in denying the motion for judgment for acquittal.

POINT V

THE ALLEGED ABUSE OF THE GRAND JURY DOES NOT CONSTITUTE GROUNDS FOR REVERSAL ON THE FACTS OF THIS CASE.

Mr. Fahey argues that he was denied a fair trial as a result of abuse of the grand jury by the Assistant United States Attorney in this case. The government submits that in the circumstances of this case if this Court is of the opinion that there was a deliberate abuse of the grand jury it did not deprive appellant Fahey of a fair trial.

This question was explored in a hearing before the trial Judge on June 5, 1974, the entire record of which is reported in the appendix. Initially we submit that this was not an act of *deliberate* abuse of the grand jury, although in retrospect it was clearly an unwise decision on the part of the Assistant United States Attorney in charge of the case. The record shows that the Assistant was preparing for the trial and encountered reluctance on the part of the accountant witness Boers to cooperate with that preparation. This reluctance of Boers was due in part, if not a large part, to the involvement of Fahey's defense attorney. (See pages 3a and 7a of June 5, 1974 transcript). In the pressure of

preparing for trial and in the face of a reluctant witness and the unclear involvement of the defense attorney, the assistant, without checking the law on the subject (See page 14a of June 5, 1974 transcript) subpoenaed the accountant and the documents to the grand jury. In this circumstance the government submits there was no *deliberate* misconduct that denied Fahey a fair trial.

In addition the government submits that in considering this issue, there are additional factors which demonstrate Fahey should not be allowed to complain that this denied him a fair trial. Defense counsel himself (See pages 12a and 13a of June 5, 1974 transcript), proposed a grand jury trial, that is, putting all witnesses, including the defendant Fahey before the grand jury and on the basis of their testimony in the grand jury decide if the case should go to trial. This proposal to use the grand jury in this fashion was made by defense counsel after the indictment had been returned and within the week before the trial date. This is the same counsel who argues that this Court should reverse the conviction on the basis of the isolated incident involving Mr. Boers.

In addition, the record clearly demonstrates that defense counsel with full knowledge of the grand jury apperance of Mr. Boers when moving to quash similar grand jury subpoenas (primarily on other grounds) made no effort to seek any kind of suppression order or protective order concerning the use of Mr. Boers' grand jury testimony in the trial. It is the kind of problem that defense counsel, who had full knowledge of its existence prior to trial, should have presented to the trial court in the first instance.

In addition in the one limited instance when Mr. Boers' grand jury testimony was used in the trial, defense counsel made no objection to that use.

The government submits that much the same as the Supreme Court ruled in *Harris* v. *New York*, 401 U.S. 222, 226 (1971), that "the shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."; this Court

should hold that a defense witness cannot testify for the defense in a way that is patently contradictory to a prior sworn statement and then contend that the witness cannot be impeached by the prior inconsistent sworn statement because it was obtained through improper use of the grand jury. (Tr. pp. 89-90).

The government submits therefore that there was no deliberate misconduct here in abusing the grand jury; that the defense participated in any such abuse of the grand jury if it was abuse; that the defense never sought timely relief or made any objection to the limited use of Boers' testimony; that the limited use of that grand jury testimony was not so prejudicial to Fahey in the entire context of this trial; and that the use of Boers' grand jury testimony for impeachment in the face of two directly contradictory sworn statements was a proper use of that testimony under the rationale of *Harris* v. *New York*, 401 U.S. 222 (1971).

POINT VI

THERE WAS NO PROSECUTORIAL MISCONDUCT ADVERSELY INFLUENCING THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

In his last point in his brief the defendant Fahey, in a shotgun approach, contends that the prosecutor, in the management of the case vis-a-vis the defendant, undertook actions that were not properly professional to the extent that he adversely influenced the right of the defendant to a fair trial. He then cites six alleged examples of this. The government submits there is no basis for alleging that Fahey was denied a fair trial and will discuss each item in the order presented in appellant's brief.

(1) The allegation that there was a deliberate abuse of the grand jury resulting in an unfair trial is clearly without merit as discussed in Point V above.

(2) The government did not withhold any evidence from the defense that had been previously committed. The government disclosed in January of 1974, for example, all prior statements of

Mr. Fahey's partners including the one who was ultimately called as a government witness, Walker McKinney. All Jencks Act material was disclosed to the defense prior to trial. (See *e.g.* Tr. p. 22). As discussed more fully in (4) below, there was some controversy concerning the Courtessis statement but it was disclosed prior to trial. In addition, it should be noted that defense counsel continuously attempted to create an aura of the government agreeing to turn every document it had over to the defense. But, as will no doubt be admitted by counsel at oral argument of this appeal, although the government agreed to turn over witness statements to the defense prior to trial, and did so, from the very institution of these discussion, the government refused to turn over the entire report of the I.R.S. special agent assigned to the case. The government took the position from the beginning that it would not turn that report over to the defense until the agent testified at trial, if he testified. Ultimately the agent did not testify. The record will show that as a result of the government's position on the special agent's report, defense counsel made a motion for a bill of particulars and discovery which defense counsel then adjourned from January of 1974 until trial. The government did not violate any agreement and a review of the record will demonstrate this.

(3) Fahey's brief asserts an alleged example of "Tailored defenses". This is incomprehensible and without a more definite statement of what is meant by this the government will not speculate on its meaning or attempt to discuss it.

(4) There is no question about the fact that the government did advise defense counsel on the day before Mr. Courtessis was subpoenaed before the grand jury that defense counsel could have a copy of the agent's memorandum of interview with Mr. Courtessis. The government then indicated, moments later, that that was a precipitous decision and we would not disclose to the defense attorney this memorandum; but rather would give it to the witness Courtessis in the grand jury room at the time he was testifying if it became necessary to refresh his recollection. As can be seen from the transcript of the June 5, 1974 hearing on the motion to quash the Courtessis grand jury subpoena, this was

the principal reason or cause for the defense motion to quash the subpoena. The trial judge then ordered the government to disclose the memorandum to the defense which the government did. Mr. Courtessis testified to that effect (Tr. p. 45). The defendant cannot now claim that it was somehow prejudiced since Mr. Courtessis and defense counsel received the memorandum before Courtessis took the stand. In addition, Courtessis then testified to nothing that was harmful to Fahey but rather seemed to be accusing the IRS special agent of persecuting Courtessis rather than investigating Fahey. Therefore, under these circumstances Fahey can hardly complain that he suffered any prejudice.

(5) Example number five can hardly be a basis for contending Fahey was denied a fair trial. From the day of arraignment on December 10, 1973 until the case was called at the Court's calendar call on May 31, 1974, defense counsel continuously requested that the Assistant United States Attorney dismiss the case, and to support that request he promised to submit a written memorandum of his arguments. The assistant agreed that if defense counsel did so and his arguments had any merit the assistant would request authority from his superiors in the Justice Department in Washington, D.C. to dismiss the indictment. It was not until the day before the calendar call that defense counsel submitted his lengthy memorandum to the assistant although he regularly assured him it would arrive in a timely fashion.

What defense counsel labels "exculpatory evidence" was in fact a memorandum of specious arguments. The arguments had no merit and consisted of long winded discussions of inapplicable regulations or attacks on the investigation conducted by the IRS special agent for the most part. After concluding that they were devoid of merit the assistant informed defense counsel that he would not seek authorization to dismiss the indictment because there was no basis to do so. Thus the allegation — "Refused to send Defense exculpatory evidence to Washington" (p. 26 Appellant's Brief). The mere fact that defense counsel, at the last minute cannot talk the Assistant

United States Attorney into dismissing the indictment is hardly a basis for alleging a denial of a fair trial. It is also interesting to note in passing that out of all the arguments submitted to convince the Assistant United States Attorney that he should dismiss the indictment, only one was actually raised by the defense at the trial and argued to the Court and jury.

(6) The defense contends that there were improper remarks made in the prosecutor's summation. A review of the record will show this is simply not so. There were four instances where the defense counsel interrupted the government's summation with an objection. Counsel objected to the characterization of Fahey as not just "any reasonable taxpayer" in response to defense counsel's summation about how Fahey was misled in this case. (Tr. pp. 222-223). The trial judge ruled that it was a proper argument for a jury to consider. That ruling was correct in light of the cases cited in Point IV, above, such as, *Ostendorff, supra,* that the jury can consider the defendant's educational and business background. Defense counsel elicited from Fahey in rather great detail his educational and business background. (Tr. pp. 106-111).

Defense counsel next objected to the government's assertion that Fahey had established that in fact what he was getting from Culotti Construction was nothing more than part of the $20,000 he was guaranteed under the partnership. The Court admonished counsel for interrupting and then stated the jury's memory of the evidence will control. (Tr. p. 225). But the prosecution was correctly stating what the evidence showed. On cross examination Fahey did establish that fact (Tr. pp. 161, 162, 163, 164, and Government's Exhibit 28) and McKinney had also so testified (Tr. p. 58).

Next, the defense counsel objected to the prosecution argument that Fahey said he got $175,000 award for those years. The Court then admonished government counsel because the Court did not recollect such testimony. (Tr. p. 230). But the record is clear that that exact testimony was elicited from Fahey by defense counsel on redirect. (Tr. p. 170).

Finally, the prosecution argument about inferences the jury could draw from the evidence that a man in dire straights for money filed a return claiming a refund one year late was interrupted with the objection that there was no evidence at all about being in dire straights anywhere in the record. The Court admonished defense counsel for interrupting and ruled it was a legitimate argument. (Tr. pp. 234-235). The record of Fahey's dire straights, financially, exists at least in Government's Exhibit 28.

It is clear, then, that all of the prosecution remarks were founded in the record and were legitimate, proper argument.

CONCLUSION

THE CONVICTION AND ALL RULINGS OF THE COURT BELOW IN THIS CASE SHOULD BE AFFIRMED.

Respectfully submitted,

JAMES M. SULLIVAN, JR.
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Northern District of New York
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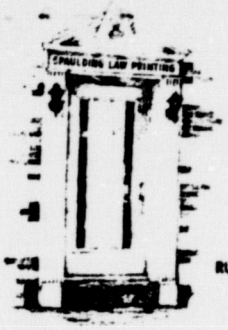

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RE: UNITED STATES OF AMERICA v. THOMAS M. FAHEY
(Docket No. 74-2108)

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

EVERETT J. REA , being duly sworn, deposes and says:

That he is associated with Spaulding Law Printing Company of Syracuse, New York, and is over twenty-one years of age.

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(s)he personally served three (3) copies of the printed [~~Record~~] [Brief] [~~Appendix~~] of the above-entitled case addressed to:

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Att: DANTE M. SCACCIA, ESQ.

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Everett J. Rea

Everett J. Rea

Sworn to before me this 30th
day of October , 1974

Ruth A. Moloughney
Commissioner of Deeds

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